

Freedom of Information Act 2000 (Section 50)

Decision Notice

27 March 2007

Public Authority: Export Credits Guarantee Department
Address: PO Box 2200
2 Exchange Tower
Harbour Exchange Square
London E14 9GS

Summary

The complainant said that the Export Credits Guarantee Department (ECGD) had refused its request for information about support given to BAE Systems (BAES), including a list of each of the BAES projects that ECGD supported, together with: the date the support was given; the type of insurance or guarantees given; the original amount; and, the then current exposure, if any. The Commissioner decided that, in refusing the request, ECGD had dealt with it in accordance with the requirements of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. On 4 February 2005, following some earlier exchanges of correspondence between them, the complainant asked ECGD for the following information in respect of support given by it to BAES, including its predecessor companies, since 1995:
 1. a list of the 190 plus relevant files; and,
 2. a list of each of the BAES projects that ECGD supported, together with: the date the support was given; the type of insurance or guarantees given; the original amount; and the current exposure, if any.
3. ECGD did not reply until 17 May 2005 - a delay far in excess of the statutory time limit set out in section 10 of the Act - and said that its calculation as to the time

- required to deal with the first part of the request had been assessed as exceeding 24 hours and that the statutory limitation set by section 12 of the Act therefore applied. To provide the information, a file list would need to be compiled manually and then cross-checked with a number of electronic systems.
4. As regards the second part of the request, ECGD provided a table containing the information sought, but with the amounts for its exposure on the Saudi Arabian Al Yamamah project withheld, and citing the exemptions in section 41 of the Act (Information provided in confidence) and section 43 (Commercial interests) as justification. (The then Al Yamamah project is now more properly known as the Saudi British Defence Cooperation Programme but is referred to as Al Yamamah throughout this Decision Notice for the purposes of clarity.)
 5. ECGD explained that it had also withheld details of a further four projects under the section 43 exemption: one project where details were withheld as it was a live case, and three where disclosure could adversely affect future business. In ECGD's view the disclosure of that information would, or would be likely to, prejudice the commercial position of either BAES or ECGD and it judged that the balance of the public interest was in favour of withholding the information. ECGD did however disclose figures for the aggregate total original exposure and current exposure for those cases where it had withheld further detail.
 6. On 17 May 2005 the complainant asked ECGD to review its decision regarding the second part of the request and challenged ECGD's view on the balance of the public interest, saying that ECGD gave a substantial subsidy to exporters by way of export credits.
 7. On 21 July 2005 ECGD replied, saying that the outcome of its internal review was to uphold the original decision. ECGD said that further consideration had been given to the public interest arguments, which were set out in detail and which are considered by the Commissioner in his analysis below.

The Investigation

Scope of the case

Chronology

8. On 19 August 2005 the complainant told the Commissioner, in a letter that also dealt with a separate complaint against another department, that its request for information had been refused. The complainant accepted that ECGD had acted correctly in withholding the information sought in the first part of the request (a list of the 190 plus relevant files which ECGD had withheld under section 12 of the Act).
On the second part of the request (a list of each of the BAES projects that ECGD had supported), the complainant said it did not believe that the economic impact of military deals with Saudi Arabia was of overall benefit to the UK and said that the public interest favoured giving as much information as possible to enable

informed studies to be undertaken. The complainant raised similar concerns in respect of the other projects by BAES which were supported by ECGD.

9. On 4 October 2005 the complainant told the Commissioner that parallel correspondence with two other government departments about the Al Yamamah project had shown that neither of them held information about the project's economic impact on the UK. ECGD provided the Commissioner's staff with comments and additional information on 20 December 2006 and 22 January, 14 February and 2 March 2007.
10. In relation to these projects, ECGD had provided either a guarantee or an insurance facility. These terms are explained in more detail in the Background annex to this Decision Notice but, in essence, an ECGD guarantee is an unconditional guarantee to a UK-based bank whereby ECGD guarantee to repay any defaulted loans, regardless of the cause of loss. Insurance is provided directly to the exporter and is conditional, covering specific causes of loss.

Analysis

Procedural matter

11. The Commissioner found that ECGD had failed by the best part of three months to meet the timescale for responding to requests set out in section 10 of the Act.

Exemptions

Section 43 (Commercial interests)

12. Section 43(2) of the Act exempts information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including those of the public authority holding it). The Commissioner has seen that the commercial partners of ECGD are competing in international commercial markets and is satisfied that the unauthorised release of commercially sensitive information, which he acknowledges has the potential to be of value to interested parties in respect of present or future transactions, may very well prejudice either ECGD's own interests or those of its partners or both. He is therefore satisfied that the exemption is engaged.
13. The commercial interests exemption is qualified and so is subject to a public interest test. ECGD can only refuse to provide the information if it believes the public interest in withholding the information outweighs the public interest in disclosing it. The Commissioner has therefore considered the application of the public interest test in this case.

The complainant's view

14. The complainant told ECGD that its work and support for military exports was the subject of much public and parliamentary debate and that it was right for attention

to be given to these matters. A Ministerial statement in June 2004 had said that there was a public subsidy given to exporters by way of export credits, which the government then valued at £120m a year although, the complainant said, other research suggested that the figure was much higher. The complainant said that debate about the financial support for exports therefore needed to be informed rather than speculative.

15. The complainant also told the Commissioner that she did not believe that what ECGD had described as the beneficial impact on the UK economy of military deals with Saudi Arabia was proven, and added that it would be in the public interest to release as much information as possible so that informed studies could be undertaken. The complainant added that similar information about other smaller projects had been supplied, and surmised that the wishes of the Saudi Arabian authorities had been placed above the UK public interest even though the UK public would have to pay for any default that might occur. With regard to the other four cases, one had been described by ECGD as having been a live case; if that was in the past, would it not now be possible for the information to be given? The other three cases all gave rise to similar concerns: the public needed to know what it was underwriting, at a cost of some £150m a year, so that informed debate could take place and the benefits to the economy be assessed.

The public authority's view

16. ECGD said that it had provided much of the information sought from the outset but had withheld information about its financial exposure in the Al Yamamah project, citing the exemptions set out in sections 43 and 41. It also withheld all information about four other cases, citing the section 43 exemption alone. ECGD's refusal notice said that the public interest in withholding the information outweighed the public interest in disclosing it but gave only a cursory explanation of its reasoning. ECGD told the Commissioner that it had agreed with BAES that the existence of ECGD insurance for Al Yamamah could be disclosed, but not the amount of the cover. Both BAES and its customer considered this information to be commercially sensitive, and that if it were to be disclosed it could cause significant harm to their relationship.
17. As regards the other four cases, ECGD said that one was a live insurance case where disclosure of the existence of ECGD insurance could increase the risk of default by the buyer, and therefore the risk of commercial harm to ECGD itself. For the remaining three cases (two guarantees and one insurance matter), disclosure had been restricted to the total value of that business. ECGD said that the disclosure of any further information could damage the commercial position of BAES by adversely affecting its relationship with its customers and potentially damaging future business prospects in those markets.
18. For insurance cases generally, ECGD said that it restricted the disclosure of information to protect its own position. This policy was intended to limit the risk of default and therefore of damage to ECGD and was consistent with the practices of other export credit agencies. ECGD acknowledged the public interest in transparency in the use of public funds but considered that protecting the

interests of the taxpayer by protecting its own publicly funded exposure outweighed it in these cases. ECGD accepted that where an insurance contract had expired, the risk to ECGD from that particular contract was spent, and that the case for disclosure was therefore stronger. However ECGD also said that disclosure of a former insurance contract could cause the buyer to assume that other present (or even future) contracts might be similarly insured, increasing the likelihood of default, so that the risk of harm to the exporter's commercial position remained. ECGD added that revealing that BAES had insured the risk of non-payment could damage its relationship with the buyer and put future business at risk.

19. ECGD told the Commissioner that, in respect of the Al Yamamah project, BAES was concerned that disclosure of the amount of insurance cover and other details would be severely prejudicial to its commercial interests and could have a serious impact on its ability to secure future business from this and other customers worldwide. ECGD said that the clear, specific and significant harm that would flow from disclosure outweighed the acknowledged public interest in making this information available.
20. In further exchanges of correspondence, ECGD told the Commissioner that BAES had warned that disclosure of past insurance business still had the potential to impact on present and future business by leading buyers to assume that other contracts might also be insured by ECGD, thereby increasing the risk of default. The potential remained for disclosure of information, even about some expired contracts, to harm the current and future commercial position of BAES. ECGD said that, where a customer had been unaware of the position, revealing whether or not BAES had insured the risk of non-payment under a contract could still damage relations with its customers and put future business at risk. ECGD said that there was no obvious public interest in revealing when ECGD had provided insurance that would outweigh the danger of harming the commercial position of BAES. In one other of these cases, BAES had made representations for non-disclosure by ECGD because of confidentiality obligations that it had agreed with the customer at the inception of the contract and because of concerns that disclosure now of the existence of ECGD guarantee cover could imperil future business.

The Commissioner's view

21. The Commissioner believes that the public interest is best served where access to information would: further public understanding of, and debate about, issues of the day; facilitate the accountability and transparency of public authorities for their decisions; and, improve accountability and transparency in the spending of public money. He has seen that ECGD commits significant sums of public money to support UK exports. These factors favour full disclosure of information by ECGD. The Commissioner considers that disclosing the general financial exposure of ECGD to public scrutiny can assist ECGD and its partners in managing their credit risks effectively. In this instance, Al Yamamah apart, ECGD met the public interest in this regard by first aggregating, and then disclosing, the total sums at issue.

22. Where the current risk exposure of ECGD on a contract has declined to zero, the Commissioner sees the case for disclosure as strengthened, since by that time there is no immediate commercial risk to ECGD. He recognises however that, even in that instance, because the customer may well not have been aware of the BAES insurance contract with ECGD, disclosure could still damage the future business prospects of both BAES and ECGD.
23. The Commissioner recognises that there are other factors which work against disclosure. BAES is operating in a very competitive international market, where winning or losing business has implications for its own business partners, including ECGD, and for the wider UK economy. The Commissioner also acknowledges that some of BAES's overseas customers have their own concerns that the unauthorised release of information could compromise their own commercial or even national interests. The Commissioner recognises that if these customers developed concerns about the integrity of BAES, then they could become reluctant to do business with it; a situation that would be damaging to BAES's commercial interests and, by extension, to those of ECGD. The Commissioner has considered the evidence provided by the complainant and ECGD, and information that it has provided from BAES about the concerns expressed by some of its customers. His conclusion in all the circumstances of this case is that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The ECGD therefore acted correctly in withholding the information requested.

Section 41 (Information provided in confidence)

24. ECGD said that the information about the amount of cover on the AI Yamamah project was exempt under section 41 of the Act as well as under section 43 but otherwise relied upon the section 43 exemption. The Commissioner found that the information about AI Yamamah had been withheld correctly under section 43 of the Act and did not proceed to consider the application of the exemption contained in section 41, although he accepts that it may be engaged.

The Decision

25. The Commissioner's decision is that ECGD dealt with the request for information in accordance with the Act.

Steps Required

26. The Commissioner requires no steps to be taken.

Right of Appeal

27. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of March 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Commercial interests

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”

Background annex

Note about ECGD Guarantees and Insurance and AI Yamamah

ECGD Guarantee

1. Often overseas buyers will want to pay for projects on credit terms, whereas the exporter would like to be paid as they complete the contract i.e. on “cash” terms. The overseas buyer will, therefore, arrange a loan and credit terms from a UK-based bank to pay for the goods and/or services which the exporter will draw upon as they carry out the contract.
2. An ECGD guarantee is an unconditional guarantee to the UK-based bank in respect of non-payment by the overseas buyer or borrower of the loan used to finance the purchase of UK goods or services. In the event that the borrower fails to repay the loan, ECGD guarantees to pay these amounts. The overseas entity will usually be aware of the involvement of ECGD in the transaction, not least because they will have to pay a “finance charge” to ECGD, and/or because ECGD may also be a party to the loan agreement.
3. For this reason there is not usually much sensitivity about the overseas bodies becoming aware of the existence of the ECGD guarantee because, by its nature, ECGD involvement will be known to them. An overseas borrower may even request the involvement of ECGD as it may not be possible for it to obtain financing without ECGD support to the lender.

ECGD Insurance

4. An insurance facility, by contrast, is provided by ECGD directly to the UK exporter and covers them against the risk of not being paid under their contract. Unlike when ECGD issues a guarantee, no loan is involved and, as far as the buyer is concerned, they are paying the exporter on cash terms. The buyer will generally be unaware that the UK exporter has taken out insurance against non-payment under the contract; it is also common practice amongst export credit agencies in other countries not to give publicity to such insurance arrangements
5. Disclosure of an insurance arrangement could deter buyers from dealing with an exporter and could also deter the exporter from dealing with ECGD. This could put BAES at a disadvantage compared with its overseas competitors (whose export credit agencies do not disclose the existence of insurance policies).
6. In seeking insurance from ECGD for certain contracts, exporters such as BAES are operating prudently in that, while the risks may be unlikely to materialise, they could have a highly damaging effect on the exporters’ financial positions if they did. In ECGD’s experience, most well run companies trading overseas seek non-payment insurance of some kind, either commercial or through ECGD.

(Source: ECGD)

Al Yamamah

7. Al Yamamah was a British – Saudi Arabian government to government agreement for the sale of certain armaments, signed in 1986. BAES was the prime contractor. Al Yamamah was Britain's largest ever export agreement. The programme is now known as the Saudi British Defence Co-operation Programme. It is a government-to-government programme with BAES acting as the UK government's prime contractor.

(Source: BAES and ECGD)